Boon Wah Air-Conditioning Engineering Sdn Bhd v Bina Goodyear Bhd

HIGH COURT (SHAH ALAM) — WINDING UP NO FLJC 28–20–01 OF 2013
VERNON ONG J
29 JULY 2013

Companies and Corporations — Meetings — Minutes — Minutes of meeting to constitute prima facie evidence of proceedings to which it relates — Companies Act 1965 s 156

Companies and Corporations — Winding up — Opposition to petition — Petition for winding up filed despite existence of scheme of arrangement approved by majority of creditors — Application for winding up proceedings to be adjourned pending conclusion of scheme of arrangement — Discretion of court in granting adjournment — Whether exceptional circumstances justifying adjournment shown — Whether petition ought to be adjourned — Companies Act 1965 ss 176 & 221

On 21 January 2013 the petitioner presented a winding up petition against the respondent, a public listed company, premised on a s 218(2)(a) notice pursuant to a judgment debt. On 19 November 2012, the respondent had announced to Bursa Malaysia that the respondent was considered a PN17 company. Pursuant to a proposed scheme of arrangement ('the scheme') to regularise the finances of the respondent, the respondent filed a suit under s 176 of the Companies Act 1965 ('Act'). The respondent convened a creditors meeting on 2 April 2013 where the scheme was approved by a majority of creditors present at the meeting representing three-fourths in value of the creditors present and voting at the meeting. The respondent thus applied under s 221 of the Act for the winding up proceedings to be adjourned pending conclusion of the respondent's s 176 application. The petitioner contended that the respondent failed to show that the scheme had been properly approved on the grounds that the minutes of the creditors' meeting provided by the respondent failed to show which creditor attended the meeting and which creditor voted in favour of the scheme.

Held, allowing the application:

(1) The court hearing a winding up petition is empowered to adjourn the hearing conditionally or unconditionally (s 221). The granting of an adjournment is in the absolute discretion of the court. Be that as it may, the discretion must be exercised judiciously. In exercising its discretion, the court must consider all the relevant facts of the case (see para) 11.

(2) As a general rule, the minutes of proceedings shall constitute prima facie evidence of the proceedings to which it relates (s 156). The petitioner's complaints about the minutes were not merited; the complaints were vague and unsubstantiated. As such the court accepted the minutes as evidence of the proceedings at the creditors' meeting (see para 14).

(3) According to the minutes, the creditors present at the meeting voted in favour of the scheme. A majority exceeding three-fourths in value of the creditors present and voting at the meeting voted in favour of the scheme. What remained to be done was for the respondent to apply for the court's sanction under s 176(3). The respondent had thus shown that there were exceptional circumstances justifying the exercise of the court's discretion in granting an adjournment of the winding up petition proceedings (see paras 15–16).

[Bahasa Malaysia summary

Pada 21 Januari 2013 pempetisyen mengemukakan petisyen penggulungan terhadap responden, syarikat awam yang disenaraikan, berdasarkan s 218(2)(a) notis berikutan hutang penghakiman. Pada 19 November 2012, responden telah mengumunkan kepada Bursa Malaysia bahawa responden dipertimbangkan sebagai syarikat PN17. Berikutan kepada skim penyusunan yang dicadangkan ('skim') untuk memulihkan kewangan responden, responden memfailkan tindakan di bawah s 176 Akta Syraikat 1965 ('Akta'). Responden mengadakan mesyuarat pemiutang pada 2 April 2013 yang mana skim tersebut diluluskan oleh majoriti pemiutang yang hadir di mesyuarat mewakili tiga perempat nilai pemiutang yang hadir and mengundi di mesyuarat tersebut. Responden oleh itu memohon di bawah s 221 Akta untuk prosiding penggulungan ditangguh sementara menunggu keputusan permohonan s 176 responden. Pempetisyen berhujah bahawa responden gagal untuk menunjukkan bahawa skim telah diluluskan secara betul atas alasan bahawa minit-minit mesyuarat pemiutang-pemiutang yang diberikan oleh responden gagal untuk menunjukkan pemiutang yang mana menghadiri mesyuarat dan pemiutang yang mana mengundi memihak skim tersebut.

Diputuskan, membenarkan permohonan:

(1) Mahkamah yang mendengar petisyen penggulungan diberi kuasa untuk menangguhkan pendengaran secara bersyarat atau tidak bersyarat (s 221). Pemberian penangguhan adalah budi bicara mutlak mahkamah. Oleh itu, budi bicara mesti dilaksanakan secara kehakiman. Dalam menjalankan budi bicaranya, mahkamah mesti mempertimbangkan kesemua fakta relevan kes (lihat perenggan 11).

(2) Sebagai peraturan am, minit-minit prosiding akan membentuk keterangan prima facie prosiding di mana ia berkaitan (s 156). Aduan pempetisyen tentang minit-minit tidak bermerit; aduan adalah kabur

dan tidak berasas. Dengan itu mahkamah menerima minit-minit sebagai keterangan prosiding di mesyuarat pemiutang-pemiutang (lihat perenggan 14).

(3) Mengikut minit-minit, pemiutang-pemiutang yang hadir di mesyuarat mengundi memihak skim tersebut. Majoriti melebihi tiga perempat dalam nilai pemiutang-pemiutang yang hadir dan mengundi di mesyuarat mengundi untuk memihak skim tersebut. Apa yang masih perlu dilakukan oleh responden adalah untuk memohon sanksi mahkamah di bawah s 176(3). Responden telah menunjukkan bahawa terdapat keadaan luar biasa menjustifikasikan pelaksanaan budi bicara mahkamah dalam memberikan penangguhan prosiding petisyen penggulungan (lihat perenggan 15–16).]

Notes

For cases on minutes, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 549–550.

For cases on opposition to petition, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1534–1588.

Cases referred to

Ayer Molek Rubber Co Bhd v Mirra Sdn Bhd [2007] MLJU 704; [2008] 2 CLJ 459, CA (refd)

Hong Leong Berhad v Peninsular Park Sdn Bhd [2008] 1 LNS 275, HC (refd)

Legislation referred to

Companies Act 1965 ss 156, 176, 176(3), 218(2)(a), 221

Peter Douglas Lim (Peter Ling & Co) for the appellant.
Jeremy Phang (Lim Chong Phang & Amy) for the respondent.

Vernon Ong J:

[1] On 2 July 2013, the court adjourned the winding up proceedings filed by the petitioner against the respondent company pending the conclusion of the respondent's s 176 application in the High Court of Kuala Lumpur. The grounds of the decision are as follows:

THE BRIEF ACCOUNT OF THE FACTS

[2] The winding up petition is premised on a s 218(2)(a) notice dated 9 October 2012 pursuant a judgment debt under a judgment obtained on 4 September 2012 against the respondent, a public listed company in Bursa Malaysia.

[3] On 31 October 2012, the respondent had given the petitioner four post-dated cheques dated 1 November 2012, 1 December 2012, 1 January 2013 and 1 February 2013. Three of the respondent's post-dated cheques were dishonoured and the respondent duly notified of the same.

[4] In the meantime, on 19 November 2012, the respondent announced to Bursa Malaysia that the respondent is considered a PN17 company.

[5] On 21 January 2013, the petitioner filed a petition to wind up the respondent.

[6] Pursuant to a proposed scheme of arrangement to regularise the finances of the respondent, the respondent filed a suit under Originating Summons No 24NCC-3–01 of 2013 (s 176 action) in the High Court of Kuala Lumpur under s 176 of the Companies Act 1965.

[7] On 22 February 2013, the respondent obtained the approval of the High Court in the s 176 action to convene a creditors' meeting to consider the scheme of arrangement.

[8] The court convened meeting was duly held on 2 April 2013. The scheme of arrangement was approved by a majority of creditors present at the meeting representing three-fourths in value of the creditors present and voting at the meeting.

THE RESPONDENT'S CASE

[9] The respondent's application is filed pursuant to s 221 of the Companies Act 1965 ('CA'). It is premised on the fact that in the event that the scheme of arrangement is approved by the High Court in the s 176 action all the respondent's creditors including the petitioner would be bound by the scheme of arrangement. And if the winding up proceedings is adjourned, the petitioner will take its place among the other creditors in its class. The scheme of arrangement must take priority over the winding up petition as all creditors, including the petitioner would receive payment from the respondent under the scheme.

THE PETITIONER'S REPLY

[10] Learned counsel for the petitioner argued that the petition is founded on a judgment debt which remains unsatisfied. It is clear that the respondent is unable to pay its debts and liable to be wound-up. The respondent failed to show that the scheme of arrangement has been approved by a majority of

creditors representing three-fourths in value of the creditors. The minutes of the creditors' meeting prodiced by the respondent fails to show which creditor attended the meeting and which creditor voted in favour of the scheme. The respondent has also failed to show any evidence of the steps it has taken towards obtaining the sanction of the court. Even if the scheme was approved by a majority of the creditors, none of the alleged majority creditors have come forward to oppose the winding up petition. In all the circumstances, the court should not exercise its discretion in favour of the respondent.

THE DECISION OF THE COURT

[11] The court hearing a winding up petition is empowered to adjourn the hearing conditionally or unconditionally (s 221 of the CA). The granting of an adjournment is in the absolute discretion of the court. Be that as it may, the discretion must be exercised judiciously. In exercising its discretion, the court must consider all the relevant facts of the case (see *Ayer Molek Rubber Co Bhd v Mirra Sdn Bhd* [2007] MLJU 704; [2008] 2 CLJ 459 (CA)).

[12] In this instance, the petitioner does not dispute the fact that the respondent has obtained an order in the s 176 action to convene a creditors' meeting to consider the scheme of arrangement. It is also not disputed that a creditors' meeting was duly convened on 2 April 2013 and that the scheme of arrangement was approved.

[13] The point of contention relates to whether the majority of the creditors who voted in favour of the scheme represent three-fourths in value of the creditors present and voting at the meeting (s 176(3) of the CA). Learned counsel for the respondent submitted that it is whilst learned counsel for the petitioner argued that there is no evidence to support this assertion.

[14] As a general rule, the minutes of proceedings shall constitute prima facie evidence of the proceedings to which it relates (s 156 of the CA). The court is not satisfied that the petitioner's complaints about the minutes is merited; the complaints are vague and unsubstantiated. As such the court accepts the minutes as evidence of the proceedings at the creditors' meeting. Accordingly, this issue can be determined by reference to the minutes of the creditors' meeting. According to the minutes (exh BGB-5 in encl 21), the creditors present at the meeting voted in favour of the scheme of arrangement.

[15] According to the minutes, the results of the voting by the creditors are as follows:

(i) RM49,705,453.53 value of debts representing 86.0% of total votes (64 votes) voted in favour of the resolution;

(ii) RM7,683,956.10 representing 13.3% of total votes (eight votes) voted against the resolution;

(iii) RM422,044.50 representing 0.7% of total votes (one vote) was spoilt; and

(iv) None abstained from voting.

[16] It is abundantly clear from the abovementioned results that a majority exceeding three-fourths in value of the creditors present and voting at the meeting voted in favour of the scheme of arrangement. What remains to be done is for the respondent to apply to the High Court in the s 176 action for the court's sanction under s 176(3) of the CA.

[17] The circumstances described above are special and exceptional circumstances in the sense that these are not every day, ordinary, usual or normal situations. The respondent is not denying its indebtedness to the petitioner. As a public company listed on Bursa Malaysia, it had in fact taken concrete steps to restructure its financial affairs. It has convened a creditors meeting pursuant to a court order. Pending the sanction of the court in the s 176 Action being obtained, there should be nothing to hinder or otherwise frustrate the respondent in pursuing this scheme of arrangement to its final conclusion — at the end of which, all the creditors under the scheme will receive their due payment (*Hong Leong Berhad v Peninsular Park Sdn Bhd* [2008] 1 LNS 275).

[18] For the foregoing reasons, the court is satisfied that the respondent has shown that there are exceptional circumstances justifying the exercise of the court's discretion in granting an adjournment of the winding up petition proceedings. Accordingly, the order of adjournment was made.

Application allowed.

Reported by Kanesh Sundrum